

CHAPTER 5

SMALL BUSINESS ADMINISTRATION'S SMALL BUSINESS SET-ASIDE PROGRAM

A. GENERAL

The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A “set-aside for small business” is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses. A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.

The determination to make a small business set-aside may be unilateral or joint. A unilateral determination is one that is made by the contracting officer. A joint determination is one that is recommended by the Small Business Administration (SBA) procurement center representative and concurred in by the contracting officer.

For acquisitions exceeding the simplified acquisition threshold, the requirement to set aside an acquisition for HUBZone small business concerns (see 19.1305) takes priority over the requirement to set aside the acquisition for small business concerns.

The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency’s small business programs. The contracting officer shall document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless a HUBZone small business set-aside or HUBZone small business sole source award is anticipated. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.

At the request of an SBA procurement center representative, the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative’s security clearance) all proposed acquisitions in excess of the micro-purchase threshold that have not been unilaterally set aside for small business.

To the extent practicable, unilateral determinations initiated by a contracting officer shall be used as the basis for small business set-asides rather than joint determinations by an SBA procurement center representative and a contracting officer.

All solicitations involving set-asides must specify the applicable small business size standard and NAICS code (see [19.303](#)).

Except as authorized by law, a contract may not be awarded as a result of a small business set-aside if the cost to the awarding agency exceeds the fair market price.

B. SMALL BUSINESS SET-ASIDE CONSIDERATIONS

Before deciding to set aside an acquisition in accordance with Subpart 19.5, 19.13, or 19.14, the contracting officer should review the acquisition for offering under the 8(a) Program. If the acquisition is offered to the SBA, SBA regulations (13 CFR 126.607(b)) give first priority to HUBZone 8(a) concerns. (FAR 19.800(e)).

Question: What requirements are not available for HUBZone contracts?

Answer: 13 CFR 126.605 - A contracting activity may not make a requirement available for a HUBZone contract if:

1. The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 46 et seq., as amended; or
2. An 8(a) participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) program, unless SBA has consented to release of the requirement from the section 8(a) program; or
3. The requirement is at or below the micro purchase threshold.

Question: What requirements are not available for SDVO contracts?

Answer: 13 CFR 125.18 - A contracting activity may not make a requirement available for a SDVO contract if:

1. The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 46 et seq., as amended; or

2. An 8 (a) participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) program, unless SBA has consented to release of the requirement from the section 8(a) program.

Question: When may a contracting officer set-aside a procurement for SDVO SBCs?

Answer: 13 CFR 125.19

1. The contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to Sec. 125.18.
2. If the contracting officer determines that Sec. 125.18 does not apply, the contracting officer should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.
3. If the CO decides to set-aside the requirement for competition restricted to SDVO SBCs, the CO must:
 - a. Have a reasonable expectation that at least two responsible SDVO SBCs will submit offers; and
 - b. Determine that award can be made at fair market price.

What is a reasonable interpretation of the interaction between the four primary small business prime contracting programs [8(a), HUBZone, SDVOSB, and traditional SB]?

1. The three “specialty” small business programs [8(a), HUBZone, and SDVOSB] should be thoroughly considered before using the traditional small business set-aside program.
2. In conducting market research, the contracting officer should review the historical aspects of the acquisition to determine if an 8(a) participant is currently performing the requirement.
3. Therefore, we can reasonably conclude the following:

Before deciding to set aside an acquisition in accordance with Subpart 19.5 [traditional SB], 19.13 (HUBZone SB), or 19.14 [SDVOSB], the contracting officer shall review the historical aspects of the acquisition (13 CFR 126.605 and CFR 125.18) to determine if an 8(a) participant currently is performing the requirement. If an 8(a) firm is currently performing the requirement, the contracting officer shall

proceed with Subpart 19.8 [8(a) contracting procedures] unless SBA has consented to release of the requirement from the 8(a) program. If an 8(a) firm is not currently performing the requirement, the contracting officer should consider Subparts 19.8 or 19.13 or 19.14 prior to the consideration of Subpart 19.5.

Or in a chart format:

After the consideration of required sources (FAR Part 8), consider:

- a. 8(a) or HUBZone or SDVOSB [13 CFR 125.19]
if currently in the 8(a) program, continue with 8(a) unless SBA has agreed to release the acquisition from the 8(a) program
- b. Traditional small business set-aside
- c. Full and open competition

C. SMALL BUSINESS SET-ASIDES

1. Requirement for Setting Aside Acquisitions

Procurements shall be conducted as a small business set-aside whenever the contracting officer has a **reasonable expectation of receiving at least two offers from responsible small business concerns** and being able to make awards at fair market prices. This requirement does not apply to purchases of \$2,500 or less (\$15,000 or less for acquisitions, or purchase from required sources of supply under Part 8 (e.g., Federal Prison Industries, Committee for Purchase from People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

2. Total Small Business Set-Asides

Except for those acquisitions set aside for very small business concerns each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500 but not over \$100,000 is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers for two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. If the contracting officer does not proceed with the small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. The small business reservation does not preclude the award of a contract with a value not greater than \$100,000.

The contracting officer shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that

- a. Offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns; and
- b. Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists.

For small business set-asides other than for construction or services, any concern proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufacturer unless the SBA has granted either a waiver or exception to the non-manufacturer rule.

3. Partial Set-Asides

A **portion** of an acquisition, except for construction, must be set aside for exclusive small business participation when:

- a. A total set-aside is not appropriate.
- b. The requirement can be divided into two or more economic production runs or lots.
- c. **One or more** small business concerns are expected to have the technical competence and capacity to fulfill the set-aside portion of the requirement at a **fair market price**.
- d. The acquisition is not subject to small purchase procedures.

When a partial set-aside is made, contracting officers should use the following procedures:

- a. The requirement should be divided into a set-aside portion and a non-set-aside portion. Each portion should be an **economic production run** or **reasonable lot** and have comparable terms and delivery schedule.
- b. The non-set-aside portion should be awarded using normal competitive contracting procedures.
- c. After all awards have been made on the non-set-aside portion, **negotiations** should be conducted with eligible concerns on the set-aside portion, as provided in the solicitation, and awards made. **Only** small business offerors who submitted responsive offers on the non-set portion are eligible to be included in the negotiations for the set-aside portion.

- d. Negotiations should be conducted with small business concerns in the order of priority indicated in the solicitation. If **equal low offers** are received on the non-set-aside portion from concerns eligible for the set-aside portion, the concern that is awarded the non-set-aside portion has **first priority** for negotiations for the set-aside portion.

4. **Methods of Conducting Set-Asides**

Total small business set-asides may be conducted by using simplified acquisition procedures, sealed bids, or competitive proposals. Partial small business set-asides may be conducted using sealed bids, or competitive proposals.

Except for the non-set-aside portion of partial set-sides, offers received from concerns that do not qualify as small business concerns shall be considered non-responsive and shall be rejected. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained.

5. **Insufficient Causes for Not Setting Aside an Acquisition**

None of the following is, in itself, sufficient cause for not setting aside an acquisition (see FAR 19.502-5):

- a. A large percentage of previous contracts for the required item or service has been awarded to small business.
- b. Less than 30 calendar days is available for receipt of offers.
- c. A class small business set-aside of the item or service has been made by another contracting activity.
- d. Small businesses are already receiving a fair proportion of the agency's contracts for supplies and services.
- e. A "brand name or equal" product description will be used in the solicitation.

D. **REVIEW AND RECOMENDATION**

1. **Contracting Officer**

Ideally, the contracting officer, in consultation with the agency's SADBUS, shall make the initial determination to set aside the proposed acquisition as an 8(a) award or a small business set-aside. In such-cases, the contracting officer signs and the SADBUS co-signs the HHS Form 653, "Small Business/Labor Surplus Area Set-aside Review Form." The contracting officer documents the contract file with the completed form. This process represents a unilateral determination and does not require the signature of the SBA PCR. (See Exhibits 1-1 & 1-2.)

- a. In accordance with the time limits in HHSAR 319.5, the SADBUS is
- b. Working in an agency where no PCR is assigned at the time of the contracting officer's rejection of the set aside.

- c. Working with the assigned and available PCR, the SADBUS is assured that a reasonable number of responsive and responsible small businesses are interested

E. REJECTING SMALL BUSINESS ADMINISTRATION RECOMENDATION

1. If the contracting officer rejects a recommendation of the SBA procurement center representative or breakout procurement center representative, written notice shall be furnished to the appropriate SBA center representative within 5 working days of the contracting officer's receipt of the recommendation.
2. The SBA procurement center representative may appeal the contracting officer's rejection to the head of the contracting activity (or designee) within 2 working days after receiving notice. The head of the contracting activity (or designee) shall render a decision in writing, and provide it to the SBA representative within 7 working days. Pending issuance of a decision to the SBA procurement center representative, the contracting officer shall suspend action on the acquisition.
3. If the head of the contracting activity agrees that the contracting officer's rejection was appropriate –
 - a. Within 1 working day, the SBA procurement center representative may request the contracting officer to suspend action on the acquisition until the SBA Administrator appeals to the agency head; and
 - b. The SBA must be allowed 15 working days after making such a written request, with which the Administrator of SBA—
 - i. May appeal to the Secretary of the Department concerned, and
 - ii. Must notify the contracting officer whether the further appeal has, in fact, been taken. If the contracting officer does not receive notification within the 15-day period, it is deemed that the SBA request to suspend the contract action has been withdrawn and that an appeal to the Secretary was not taken.
4. When the contracting officer has been notified with the 15-day period that the SBA has appealed to the agency head, the head of the contracting activity (or designee) shall forward justification for its decision to the agency head. The contracting officer shall suspend contract action until notification is received that the SBA appeal has been settled.
5. The agency had shall reply to the SBA within 30 working days after receiving the appeal. The decision of the agency head shall be final.
6. A request to suspend action on an acquisition need not be honored if the contracting officer determines that proceeding to contract award and performance is in the public interest. The contracting officer shall include in the contract file a statement of the facts justifying the determination, and shall promptly notify the SBA representative of the determination and provide a copy of the justification.